REPUBLIC OFKENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CIVIL APPEAL NO. 132 OF 2011

EASTERN PRODUCE (K) LIMITED…….APPELLANT

VERSUS

JONAH KIBIWOT YEGO…….RESPONDENT

JUDGMENT

This is an appeal from the Judgment and Decree of the Principal Magistrate's court at Kapsabet in Kapsabet PMCC No. 193 of 2009 on the 28th day of June 2011 by the learned Principal Magistrate the Honourable A.Lorot.

Mr. Terigin holding brief for Mr. Kibichy appeared for the Appellant while Mr. Barasa holding brief for Mr. Omondi appeared for the Respondents herein. Both Counsels proceeded with the appeal by way of written submissions.

FACTS

The facts of this appeal are that, the Respondent herein was an employee of the Appellant and worked as a guard at Chemoni Tea Estate. While the Respondent was on duty on 13th April, 2009, thugs attacked him, he ran and fell into a hole that had been covered by grass. The Respondent lost a tooth and injured his left hip. He was treated at the company's dispensary and later at Kapsabet District Hospital. Treatment notes were produced by the Respondent. Dr. Aluda saw the respondent and confirmed he had the following injuries:

(i) He had lost an upper incisor tooth.

(ii) He had a blunt trauma to the left hip

(iii) He had a cut wound on the lower hip.

The Respondent blamed the Appellant herein for the injuries sustained. At the initial trial the Appellant tendered no evidence and also did not file submissions.

The learned trial magistrate, considered the authorities cited by the Respondent for the injuries and awarded a sum of Kshs 150,000 and costs of Kshs 1,500. The learned trial magistrate entered a final judgment for the Respondent against the Appellant in the sum of Kshs 151,500 plus costs and interest.

The Appellant being aggrieved with the said judgment filed this appeal and listed the following grounds of appeal;

(i) The Learned trial Magistrate erred by arriving at a finding on liability, which was not supported by evidence.

(ii) The Respondent's case was not proved on balance of probability as is required by law.

(iii) The trial Magistrate should have found that there was no basis on which the Appellant could be blamed for the incident alleged and injuries sustained.

(iv) The learned trial magistrate's assessment of compensation was inappropriate and irregular vi-a-vis the circumstances of the case.

(v) The learned trial magistrate erred on all points of fact and law in as far as both liability and assessment is concerned.

It is the Appellants contention that the trial court should not have held the Appellant 100% liable but should have apportioned the same as there was contributory negligence on the part of the Respondent. That the Respondent had the option of fleeing on the path but opted to flee into the tea bushes thus slipping into the hole.

The Appellant also contends that the accident or risk was not foreseeable and the Appellant could

not have done anything to prevent the accident and that the Respondent failed to canvas evidence to attach liability to the Appellant.

The Appellant contended that the injuries were minor soft tissue injuries and that the award for Kshs 150,000/= for general damages was inordinate and too high in the circumstances.

The Appellant proposed a sum of Kshs 50,000/= as a reasonable sum for general damages.

The Appellant therefore prayed that the appeal be allowed with costs.

The appeal was opposed by the Respondent. It was the Respondent's contention that the injuries were sustained while in the line of duty and the Appellant had failed to cover the hole or put clear and visible signs or warning of the existence of the hole and that this was a breach of its statutory duty of care.

The Respondent prayed that the appeal be dismissed with costs for the Respondent.

ISSUES FOR DETERMINATION.

I have read the written submissions of the Counsel for the Appellant and Counsel for the Respondent and find that the issues for determination are;

(i) Liability

(ii) Quantum

ANALYSIS & FINDINGS.

On the issue of liability after perusal of the Record of Appeal I find that the Appellant did not tender any evidence at the hearing on this issue nor did they make any submissions as to the foreseeability of the risk.

The case of **DONOGUE –VS- STEVENSON [1932) A.C 52** lays down the principle as set out hereunder:

"……you must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbor..…"

I find that the Appellant nevertheless, still had a duty of care as **set out in the case of DONOGUE –VS- STEVENSON (Supra)** and that the Respondent also contributed to his injuries.

I have perused the Record of Appeal and find that in cross-examination the Respondent stated that the Appellant did not fill up the holes or post warning signs. The Respondent adduced no evidence and gave no details as to the size and magnitude of the hole. The Respondent had an option to run on the well laid out path but opted to run into the bushes.

I find that the risk was not foreseeable and that the Respondent also contributed to his injuries. I shall apportion liability on a basis of 60% to the Appellant and 40% to the Respondent.

On the issue of quantum the authority cited by the Appellant **KITAVI –VS- COASTAL BOTTLERS LTD CA 69 OF 1984** and also in the authority of **BUTT –VS- KHAN.** Both authorities set down the principles upon which an appellate court can interfere with an award for general damages; as set down hereunder:

"……the Court of Appeal should only disturb an award for damages when the trial judge has taken into account a factor he ought not to have or failed to take in to account something he ought to have or if the award is so high or so low, it amounts to an erroneous estimate……"

I find that the trial magistrate's award to be reasonable and not excessive and hat it was based on the injuries sustained and the evidence adduced by the Respondent and that the trail magistrate did not apply wrong principles in arriving at the award and find no reason to interfere with the award.

The award is satisfactory when compared to other awards made for soft tissue injuries of a similar nature.

The Respondent did not file a cross appeal and therefore the award cannot be enhanced by this court.

CONCLUSION:

The appeal is partially successful on the issue of liability

The judgment and decree of the lower court is hereby set aside and judgment is hereby entered in

favour of the Respondent in the sum of Kshs 150,ooo/ for general damages less contributory negligence of 60% making the sum of Kshs 90,000/=. Proven special damages of Kshs 1500/= together with costs and interest.

The Appellant shall shoulder the costs of the appeal.

Dated and delivered at Eldoret this 23rd day of March 2012.

A.MSHILA

JUDGE

Coram:

Before: Hon. A. Mshila J

CC: Andrew

Counsel for Appellant……..

Counsel for Respondent……..

A.MSHILA

JUDGE